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IN THE

Supreme Court of the United States

No. 377.

OCTOBER TERM, 1935.

ASA H. WHITFIELD,

Petitioner,

vs.

THE STATE OF OHIO.

MEMORANDUM OF NEW YORK STATE, AMICUS CURIAE, AND MOTION FOR LEAVE TO FILE.

JOHN J. BENNETT, JR.,
Attorney General,
State of New York,
Albany, N. Y.

HENRY EPSTEIN,
Solicitor General.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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vs.
THE STATE OF OHIO.

Motion for Leave to File.

NOW COMES the State of New York, appearing by its Attorney General, John J. Bennett, Jr., and Henry Epstein, Solicitor General, and moves this Honorable Court for permission to file a memorandum, *amicus curiae,* in support of the position of the appellee, the State of Ohio, in the above entitled appeal, before this court.

JOHN J. BENNETT, JR.,
Attorney General,
State of New York,
Albany, N. Y.

HENRY EPSTEIN,
Solicitor General.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 377.

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ASA H. WHITFIELD,
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vs.

THE STATE OF OHIO.

MEMORANDUM OF NEW YORK STATE, AMICUS CURIAE.

Statement.

The State of New York has upon its statute books, section 69 of the General Business Law, similar in character to Section 2228-1, General Code of Ohio, the statute involved in the instant appeal.

Section 69 of the General Business Law reads as follows:

> "§ 69. *Sale of convict made goods.* No goods, wares, or merchandise, manufactured, produced or mined wholly or in part by convicts, or prisoners, except convicts or prisoners on parole or probation, shall be sold in this state to any person, firm, association or corporation except that nothing in this section shall be construed to forbid the

sale of such goods produced in the prison institutions of this state to the state, or any political division thereof, or to any public institution owned or managed and controlled by the state, or any political division thereof as provided in section one hundred eighty-four of the correction law.

A violation of the provisions of this section shall constitute a misdemeanor."

Heretofore the State of New York in conjunction with other states, as co-defendants, submitted to this court its brief in an attempted action, covering substantially the issues involved in the instant controversy. The court is respectfully referred to said *"Brief of Defendants on Motion for Leave to File Bill of Complaint"* in matter of State of Alabama, Plaintiff, vs. State of Arizona, *et al.*, Defendants, in the October Term, 1933, in this court. It would be unnecessarily repetitious here again to print said arguments and citations.

Since the presentation to this court in the said case of Alabama vs. Arizona, *et al.*, the Supreme Court of New York, at a Special Term thereof, passed upon the constitutionality of the said § 69 of the General Business Law of New York State and the Hawes-Cooper Act of Congress (49 U. S. C. A. 65, 45 Stat. 1084, Act of Congress, Ch. 79 of 1929). No appeal was taken from the judgment entered on said determination.

In an action in equity, brought by one Harry Greenthal, plaintiff, against John J. Bennett, Jr., as Attorney General of New York, defendant, an injunction was sought to restrain the enforcement of Section 69 of the General Business Law of New York. In said

action the validity of the Hawes-Cooper Act and of the New York law was attacked. The court at Special Term dismissed the complaint and rendered judgment for defendant. Judgment was entered Aug. 22, 1934.

Copies of the judgment, findings of fact, conclusions of law, and opinion of the court are hereto annexed for the consideration of this court.

All of which is respectfully submitted, praying that the determination of the Supreme Court of Ohio be affirmed.

JOHN J. BENNETT, JR.,
Attorney General,
State of New York.

HENRY EPSTEIN,
Solicitor General.

Appendix.

Judgment.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney General of the State of New York,
Defendant.

The above entitled action having regularly come on for trial before Hon. John T. Loughran, Justice of the Supreme Court, on the 28th day of April, 1933, and the plaintiff having adduced evidence in support of the allegations contained in the complaint, and the defendant having moved upon the said evidence for a dismissal of the complaint herein, and the Court after due consideration of all the evidence and after hearing Mortimer Fishel, Esq., counsel for the plaintiff, in support of the petition for an injunction, and John J. Bennett, Jr., of counsel, in opposition thereto, and likewise in support of a motion to dismiss the complaint herein, and the Court having rendered its decision with an opinion, it is now, in accordance therewith, and pursuant to stipulation attached hereto, dated July 31, 1934, and the findings of fact and conclusions of law therein stipulated,

ORDERED AND ADJUDGED that the defendant have judgment dismissing the complaint upon the merits, but without costs.

Dated August 22nd, 1934.

CHRISTOPHER J. HEFFERNAN,
Justice of the Supreme Court.

Enter:

Decision, Findings of Fact and Conclusions of Law.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney General of the State of New York,
Defendant.

Upon the evidence adduced in the above entitled action and due consideration having been given thereto, the decision of the Court is as follows:

FINDINGS OF FACT.

The Court finds the following material facts pertinent to a determination of the issues herein:

1. That at the time of the commencement of this action the plaintiff was and still is a citizen and resident of the State of New York.

2. That the defendant is the duly elected Attorney General of the State of New York, and acting as such enforces the laws, the observance thereof and compliance therewith and may be called upon to prosecute actions and proceedings in which the State may be interested in connection therewith; that at the time of the commencement of this action the defendant was and still is the duly elected Attorney General of the

State of New York with the foregoing powers and duties.

3. That for some time past, at the time of the commencement of this action, prior thereto and subsequent thereto, the plaintiff was and continued to be engaged in the buying, selling and dealing in goods, wares and merchandise manufactured by convicts and prisoners of states other than the State of New York not on parole or probation; more particularly, in marketing, buying, selling and dealing in work-shirts, overalls and other apparel manufactured by convicts and prisoners of states other than the State of New York not on parole or probation.

4. That the plaintiff at the time of the commencement of this action had contracts with others under which the plaintiff might purchase the aforesaid merchandise manufactured by convicts and prisoners of other states than the State of New York not on parole or probation until the first day of July, 1934, and that the said contracts provided for a renewal thereof.

5. The plaintiff likewise, for the conduct of said business, among other obligations and property had and still has a lease on premises in the State of New York for the conduct of such business, which said lease will not expire until July 1st, 1934 and is subject to renewal by the said plaintiff.

6. That in order for the plaintiff to conduct his said business it becomes necessary for him to purchase the said merchandise manufactured by convicts and prisoners of other states than the State of New York not

on parole or probation in advance, and to enter into contracts for the shipment to him from other states and by him within this State and into other states of such merchandise.

7. The said contracts and lease held by the plaintiff constitute a property right of the plaintiff.

8. Heretofore and on or about the 19th day of January, 1929, there was enacted by the Congress of the United States an Act entitled "An Act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases," and in words as follows:

"Section 1. All goods, wares and merchandise, manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Section 2. This Act shall take effect five years after the date of its approval."

The said Act was approved on and the date of its approval was January 19th, 1929, and the said Act became effective January 19th, 1934.

9. That on or about the 28th day of February, 1933, there was enacted by the Legislature of the State of New York and approved and signed and declared to be law, to take effect January 19th, 1934, by the Governor of the State of New York, a measure in words as follows:

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. In order to protect free labor from the unjust competition of convict labor and conditions at present warranting the exercise of the sovereign power of the state in enacting this amendment, section sixty-nine of chapter twenty-five of the laws of nineteen hundred and nine, entitled "An act relating to general business, constituting chapter twenty of the consolidated laws," as added by chapter one hundred and thirty-six of the laws of nineteen hundred and thirty, is hereby amended to read as follows:

69. Sale of convict made goods. No goods, wares, or merchandise, manufactured, produced or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold in this state to any person, firm, association or corporation except that nothing in this section shall be construed to forbid the sale of such goods produced in the prison institutions of this state to the state, or any political division thereof, or to any public institution owned or man-

aged and controlled by the state, or any political division thereof as provided in section one hundred eighty-four of the correction law.

2. This act shall take effect January nineteenth, nineteen hundred thirty-four."

10. That prior to the 28th day of February, 1933, the corresponding provision of the New York General Business Law, amended by the Act hereinabove set forth in paragraph 9 hereof, was as follows:

§69. Sale of convict made goods manufactured or mined in other states. No goods, wares, or merchandise, manufactured or mined by convicts or prisoners of other states, except convicts or prisoners on parole or probation, shall be shipped into this state to be sold on the open market, or sold to, or exchanged, with an institution of this state or with any of its political subdivisions.

11. By virtue of Section 69 of the General Business Law as amended and as hereinabove set forth in paragraph 9 hereof, the plaintiff may not carry on his business of selling within this state merchandise manufactured by prisoners and convicts of states other than the State of New York not on parole or probation.

12. The Legislature of the State of New York in enacting the amendment to Section 69 of the General Business Law, effective January 19th, 1934, established it as a public policy in the exercise of the sovereign power of the State that the unfair and unjust competition of the products of convict and prison labor was detrimental to the interests of the products of free labor and that it was necessary under the conditions

existing to protect the said products of free labor from such unjust competition by the enactment of the provisions stated in Section 69 of the General Business Law.

CONCLUSIONS OF LAW.

The Court reaches the following conclusions of law:

1. The enactment of January 19th, 1929, of the Congress of the United States, entitled "An Act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases" (Chapter 79, 45 Statutes 1084) is a valid and constitutional law entitled to full force and effect.

2. Chapter 26 of the Laws of 1933 of the State of New York, constituting an amendment to Section 69 of the General Business Law, is a valid exercise of the sovereign power of the State of New York and does not constitute a denial of due process of law.

3. The plaintiff is not entitled to injunctive relief restraining the enforcement of Section 69 of the General Business Law of the State of New York as amended by Chapter 26 of the Laws of 1933.

4. Defendant is entitled to a judgment dismissing the complaint upon the merits.

Dated: August 22nd, 1934.

CHRISTOPHER J. HEFFERNAN,
Justice of the Supreme Court.

Stipulation.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney General of the State of New York,
Defendant.

IT IS HEREBY STIPULATED by and between counsel for the parties to the above entitled action that judgment may be entered upon the findings of fact and conclusions of law of the defendant before any Justice of the Supreme Court with the same force and effect as if entered by order of Mr. Justice John T. Loughran.

Dated: July 31, 1934.

MORTIMER FISHEL,
Attorney for Plaintiff.

JOHN J. BENNETT, JR.,
Attorney General for himself.

Memorandum.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney General of the State of New York,
Defendant.

ULSTER SPECIAL TERM

(December, 1933)

Action to restrain enforcement of the Hawes-Cooper bill (Act of January 1929, ch. 79, 45 Stat. 1084, 49 U. S. C. A. 65) and New York Business Law 69 (L. 1933, ch. 26).

MORTIMER FISHEL, for plaintiff.
HENRY EPSTEIN, Solicitor General for defendant.

(LOUGHRAN, J.)

The Act of Congress is assailed as an attempt (1) to delegate to the states the exclusive Federal power over interstate commerce; or (2) to control production of innocuous goods so as to equalize competition in industry. I am of opinion that the basis to neither objection inheres in the Act. Congress may affirmatively assent to an exercise of state police power otherwise valid, although interstate commerce is thereby limited.

(In re Rahrer, 140 U. S. 545.) Control of the disposition of prison goods in one state (if a legitimate end of the police power there) is not essentially the regulation of their production in another state *(cf.* Hammer v. Dagenhart, 247 U. S. 251).

The New York statute is challenged as obnoxious to the due process clauses. That challenge, I think, is invalid. It is the policy of the state, as declared by the statute, "to protect free labor from the unjust competition of convict labor,"—a policy persistently asserted for more than a generation (L. 1894, ch. 696; L. 1928, ch. 805). It is sound to keep convicts at work. The products of free labor must be marketed at a profit. If there be conflict between these objectives, the choice was for the legislature (*Barbier v. Connolly,* 113 U. S. 27; *Noble State Bank v. Haskell,* 219 *id.* 104; *Central Lumber Co. v. South Dakota,* 226 *id.* 157, 160). The cases cited by plaintiff (*People v. Hawkins,* 157 N. Y. 1; *People v. Raynes,* 136 App. Div. 417; aff'd 198 N. Y. 539, 662) are not here controlling. In the *Hawkins* case only one member of the court took the position that the legislation there reviewed amounted to a denial of due process. Final determination of the *Raynes* case also turned on the commerce clause (198 N. Y. 622).

Judgment for the defendant.

Dated January 5, 1934.